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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1577

CITY OF MESQUITE,

Appellant,

vs.

ALADDIN'S CASTLE, INC.,

Appellee.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR ATARI, INC. AS AMICUS CURIAE

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Atari, Inc. respectfully submits this brief as *amicus curiae*. All of the parties to this cause, through their counsel, have consented to this filing. Written consents have been filed with the Clerk pursuant to Rule 36.2 of this Court.

INTEREST OF AMICUS

Atari, Inc., a subsidiary of Warner Communications, Inc., is the first and largest manufacturer of coin-operated video games. Atari's "PONG" game gave birth to the coin-operated video game business in 1970. Atari's "ASTEROIDS" game proved the most popular video-game ever invented. It introduced tens of millions of Americans to the excitement of computer-controlled amusement machines.

Atari shares a vital interest in the outcome of this case. Obvious financial harm to Atari's business would follow this Court's authorization of restrictive ordinances such as Mesquite's. Atari also shares the interest of the industry, its customers, and the public in a reasoned resolution of the important issues this case raises. Atari views this case, however, as a peculiarly poor vehicle to determine whether a municipality may curtail the liberty interests of American youth in pursuing legitimate recreation, while, in the process destroying a legitimate business and stifling a young industry. Sound, conventional constitutional doctrine supports the judgment of the Court of Appeals.

SUMMARY OF ARGUMENT

Mesquite would use this case to raise issues of far-reaching implications: To what extent, and on what basis, can a municipality abridge youths' "right of social association?" How far can a municipality go in destroying a legitimate business without violating due process and equal protection rights? Atari submits that, in view of the established principles supporting the lower court's ruling, the Court need not, and should not, resolve those novel issues in the context of this case. The City of Mesquite has not properly invoked the Court's appellate jurisdiction. Moreover, the inadequacies in the record and the existence of sound reasons to uphold the Court of Appeals' judgment suggest the case does not deserve plenary review.

ARGUMENT

Atari, Inc., as *amicus curiae,* respectfully suggests: (1) the appeal should be dismissed because this Court lacks jurisdiction; and (2) treating the appeal as a petition for a writ of certiorari, the petition should be denied.

The Court of Appeals held invalid both aspects of Mesquite Ordinance No. 1353: (1) the prohibition of a license for a coin-operated amusement center to anyone having a "connection with criminal elements"[1]; and (2) the restriction of admission to coin-operated amusement centers to persons 17 years of age or older.

Mesquite has not Properly Invoked this Court's Appellate Jurisdiction

The Court of Appeals held that Mesquite's age-limitation ordinance violated both the United States and Texas constitutional guarantees of due process of law and equal protection of the laws. 630 F.2d at 1038-39. Mesquite has appealed, however, only from the ruling insofar as it rests upon an interpretation of the federal Constitution. Mesquite's Jurisdictional Statement raises only the federal question and lists only two laws as involved on the appeal—the Fourteenth Amendment to the Constitution of the United States and Ordinance No. 1353 of the Code of the City of Mesquite. The Jurisdictional Statement makes no attempt to appeal the Court of Appeals' ruling with respect to Article I, Section 19 or Article I, Section 3 of the Texas Constitution. Those Texas constitutional provisions are that State's counterparts to the federal due process and equal protection clauses, respectively.

The result is that this Court's review of the federal constitutional question would not affect the judgment below even if Mesquite prevailed here. Thus, plenary consideration of the age-limitation issue could result only in an advisory opinion,

[1]Atari supports the Fifth Circuit's holding that the ordinance's other test—"connection with criminal elements"—is void for vagueness. Atari will not discuss that aspect of the case, however, because it is not of general interest to Atari or the industry. Moreover, Atari notes that Mesquite's repeal of the "connection with criminal elements" provision may render that aspect of the appeal moot.

which Article III of the Constitution precludes. The appeal should, therefore, be dismissed, and certiorari should be denied.

THIS CASE DOES NOT DESERVE PLENARY REVIEW

Treating Mesquite's Jurisdictional Statement as a petition for a writ of certiorari pursuant to 28 U.S.C. §2103, this Court should deny certiorari. Adequate, independent state-law grounds support the Court of Appeals' judgment. *Cf. Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963). As a prudential matter, the Court should also decline to decree constitutional doctrine grounded on the inadequate record in this case. Moreover, resolution of the questions Mesquite raises in its Jurisdictional Statement is not required since the judgment of the Court of Appeals is correct on other grounds.

A Poor Record Comes Before this Court

The record before this Court is inadequate for the Court to examine the general constitutional validity of a flat prohibition on children playing coin-operated games. In enacting its age-limitation ordinance and defending it in the lower Courts, Mesquite tendered no evidence of the effect of coin-operated games themselves on young patrons. Moreover, Mesquite failed ever to substantiate its declaration that "the congregation of youthful persons [at game centers] creates problems of policing due to the need to protect such patrons from the influences of those who would promote gambling, sale of narcotics and other unlawful activities . . . ." 434 F.Supp. at 476. As the Court of Appeals found:

> [T]he record is entirely devoid of evidence that a person under seventeen years of age has been exposed to a person "who would promote gambling, [the] sale of narcotics and other unlawful activities" while in a coin-operated amusement center in Mesquite. The district

> court recognized, as we do, that the city presented no evidence that such people ever come to these centers. Initially, therefore, we note that the city failed to demonstrate any need which would give rise to an interest in protecting its young citizens from corrupt influences in amusement centers.

630 F.2d at 1040. In this Court, Mesquite glosses its failure of proof. Rather, it seeks to sustain its ordinance on the basis of a presumption of legislative validity. (Appellant's Br. 12-13).

This Court has taught that poor factual records, such as in this case, provide a weak foundation upon which to build constitutional principles.

> [T]he record is not adequate for disposition of the case in terms of its constitutional problems. . . . We should consider it [the judgment below] if, and only if, we should and can dispose of it on its record in terms of constitutional principle. The Court's disposition of this case is based upon the sound premise that we should not use our certiorari jurisdiction to express our views on a point in a case which we cannot dispose of because of inadequacies of the record which cannot realistically be remedied.

Massachusetts v. *Painten*, 389 U.S. 560, 561-62 (1968) (Fortas, J., concurring). See also *Wainwright* v. *New Orleans*, 392 U.S. 598, 598-600 (1968) (Fortas and Marshall, JJ., concurring); *Kimbrough* v. *United States*, 364 U.S. 661 (1961).

The presence of novel constitutional issues in this case makes the weaknesses in the record even more serious. The Court of Appeals grounded its judgment, in part, on a new-found "right of social association." The District Court never considered the "right of social association," however, and the parties never addressed the issue there or in the Fifth Circuit Court of Appeals. Moreover, no other Court of Appeals has

yet discerned a similar right, much less created a conflict with the Fifth Circuit. Under these circumstances, the language of *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959), bears repeating:

> "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. . . . Resolution here of the extent to which these bill of lading provisions may be given effect in our courts can await a day when the issue is posed less abstractly."

359 U.S. at 184. Similarly, resolution here of youths' liberty interests in playing coin-operated games can better await another, fully-litigated case.

The Judgment of the Court of Appeals is Correct

This Court should also deny the petition for a writ of certiorari, or summarily affirm, in light of the fact that the Court of Appeals judgment is clearly correct.

The Court of Appeals invalidated Mesquite's age restriction ordinance on the grounds both that it impermissibly abridged young people's "right of social association" and that it lacked a rational basis. Because the age provision promotes no legitimate governmental interest, it has no rational basis as required by the due process clause of the Fourteenth Amendment. *Western and Southern Life Insurance Co.* v. *State Board of Equalization of California*, —U.S.—, 49 U.S.L.W. 4942, 4947 (1981).

The Court recently struck down an act of Congress for failure to satisfy the rational basis test in *United States Department of Agriculture* v. *Monreno*, 413 U.S. 528 (1973). The statute at issue in *Monreno* barred food stamps to households whose members were not all related. The Court determined from the legislative history that the actual purpose of that provision, as opposed to its purported purpose of

preventing "abuse of the program," was to deny food stamps to "hippies" or people living in "communes." In language appropriate to the present case, the Court held:

> For if the constitutional conception of 'equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.

413 U.S. at 534 (emphasis in the original). Cf. *Oestereich* v. *Selective Service System,* 393 U.S. 233 (1968).

Similarly, in *United States Railroad Retirement Board* v. *Fritz,* —U.S.—, 101 S.Ct. 453 (1980), the Court held that Congress could exclude certain employees from the class whose rights to retirement benefits were grandfathered "absent some reason to infer antipathy" toward the excluded group. 101 S.Ct. at 461 n.12, quoting *Vance* v. *Bradley,* 440 U.S. 93, 97 (1979). As Justice Stevens' concurrence put it, "If the adverse impact of the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." 101 S.Ct. at 462.

Here, the adverse impact is so apparent an aim of the Mesquite City Council, and the target is so obviously Aladdin's and only Aladdin's, that Aladdin's could successfully have attacked the ordinance putting it out of business as a bill of attainder. As a bill of attainder, the Mesquite ordinance lacks the "legitimate governmental interest" necessary to satisfy the rational basis test.

The record reveals Mesquite's unfair efforts to stymie Aladdin's. Aladdin's first persuaded the Mesquite City Council to alter its zoning and licensing ordinances to make it possible for Aladdin's to operate. Mesquite amended its licensing ordinance to permit children over the age of six to enter game centers which enforced the operating policies to which Aladdin's adhered. Aladdin's then signed a ten-year

lease at a monthly rental of about $2,400.00 and spent approximately an additional $90,000 preparing the property for operations.

Mesquite then backtracked. It first denied Aladdin's a license under an ordinance referring to "connections with criminal elements." The reason was that Aladdin's parent company and its president had once been indicted—and acquitted—on charges of participation in racketeering and gambling activities. Aladdin's sued for injunctive relief in state court and won. The trial court held the ordinance impermissibly vague, general, and indefinite. The court also found that no evidence supported denying Aladdin's a license and that neither Aladdin's nor its parent had any connections with criminal elements. Mesquite issued the license and gave notice of appeal. (Subsequently, the judgment of the state trial court was affirmed.)

While Mesquite's appeal of the state-court judgment was pending, however, the city adopted Ordinance No. 1353, at issue here, which repealed Aladdin's exemption and restored the seventeen year-old age limitation. The City Council knew from its prior negotiations with Aladdin's that the age restriction would make the amusement center unprofitable and force Aladdin's to close it.

Mesquite now defends this new ordinance on the basis of an alleged desire to prevent truancy and delinquency. As the City Council knew, however, Aladdin's has an adult manager on the premises at all times in all its centers to enforce its rules against gambling, smoking, and consumption of food and beverages. Moreover, Aladdin's does not permit children of school age on the premises during school hours. Consideration of such policies persuaded the City Council to exempt Aladdin's in the first place. The policies have not changed and the City Council made no attempt to incorporate Aladdin's operating policies into the new

ordinance. Instead, the new Ordinance No. 1353 redefined "connection with criminal elements" and imposed the age limitation in a double-barreled effort to put Aladdin's out of business. Mesquite is again attempting to do what the state courts held it could not do; its age requirement serves no other purpose. Mesquite would punish Aladdin's and destroy its business solely because its parent corporation was once indicted.

Mesquite's rifle-shot ordinance amounts to a bill of attainder. The bill of attainder clause is "not to be given a narrow historical reading . . ., but [is] instead to be read in light of the evil the Framers had sought to bar: legislative punishment of any form or severity, of specially designated persons or groups." *United States* v. *Brown*, 381 U.S. 437, 447 (1965). The clause bans "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . . ." *United States* v. *Lovett*, 328 U.S. 303, 315 (1946), quoted with approval in *United States* v. *Brown*, *supra*, 381 U.S. at 448-49. Like a bill of attainder, the reinstatement of the age requirement was a legislative act. It afforded Aladdin's none of the protections of a judicial trial before depriving the amusement center of the business of Mesquite's youth.

The Mesquite ordinance also shares two other characteristics of a bill of attainder. The age requirement focused on an "easily ascertainable member[ ] of a group . . . ." *United States* v. *Lovett*, *supra*, 381 U.S. at 315. Only Aladdin's investment and business are to be destroyed.

The new ordinance, moreover, unquestionably "inflict[ed] punishment" upon Aladdin's. *Nixon* v. *Administrator of GSA*, 433 U.S. 425, 472 (1977). As this Court noted in the *Nixon* case, the constitutional prohibition of bills of attainder extends to a "wide array" of punishments' including

"a legislative enactment barring designated individuals or groups from participation in specified employments or vocations . . . ." 433 U.S. at 474.[2]

The complete record demonstrates that the only motivation for Mesquite's new ordinance is a specific antipathy toward Aladdin's—not because of anything it did, but because of its parent's identity. Because Mesquite's desire to harm Aladdin's constitutes no legitimate governmental purpose, *United States Department of Agriculture* v. *Monreno, supra,* 413 U.S. at 534, its ordinance fails to have a rational basis. The upshot is that the judgment below is clearly correct and the case does not warrant plenary review.[3]

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[2]Just as the Court did not allow Missouri and Congress to use oath requirements to prohibit, in effect, individuals from serving as priests and from practicing law, *see Cummings* v. *Missouri,* 71 U.S. (4 Wall.) 277 (1867), the Court should not permit Mesquite to use an age requirement to prohibit Aladdin's from operating an amusement center. Similarly, just as the Court did not let Congress prevent alleged "subversives" from receiving their salaries from the federal government, *see United States* v. *Lovett,* 328 U.S. 303 (1946), or preclude Communist Party members from serving as union officials, *see United States* v. *Brown,* 381 U.S. 437 (1965), the Court should not tolerate Mesquite's attempt to bar Aladdin's from the amusement center business.

[3]The Fifth Circuit's additional, and novel rationales for the invalidity of the ordinance do not themselves warrant review since "[t]his Court reviews . . . judgments, not statements in opinions." *Black v. Cutter Laboratories,* 351 U.S. 292, 297 (1956). Moreover, this Court has recently reiterated that "[a]s a prudential matter it is our practice to avoid the unnecessary decision of novel constitutional questions." *Leroy* v. *Great Western United Corp.,* 443 U.S. 173, 181 (1979).

CONCLUSION

Atari, Inc., as *amicus curiae,* resepctfully suggests that the appeal should be dismissed and the petition for a writ of certiorari denied.

DATED: September 1, 1981

Respectfully submitted,

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